IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960.

No. 41

A. L. MECHLING BARGE LINES INC., a corporation, MISSISSIPPI VALLEY BARGE LINE COMPANY, a corporation, THE OHIO RIVER COMPANY, a corporation, and BLASKE, INC., a corporation,

*Plaintiffs-Appellants,*

*vs.*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

*Defendants-Appellees.*

## JURISDICTIONAL STATEMENT.

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## JURISDICTIONAL STATEMENT.

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This appeal is filed on behalf of A. L. Mechling Barge Lines Inc., Misissippi Valley Barge Line Company, The Ohio River Company and Blaske, Inc. These appellants will sometimes hereinafter be referred to as "Barge Lines".

## OPINION BELOW.

The opinion of the three-judge United States District Court for the Eastern District of Missouri, Eastern Division, is attached hereto as Appendix A. The final judgment of the District Court, dated September 16, 1960, is attached hereto as Appendix B. The orders of the Interstate Commerce Commission, sometimes referred to hereinafter as the "Commission", dated January 9, 1959, July 17, 1959, August 7, 1959 and Septeber 10, 1959, are attached hereto as Appendices C, D, E, and F.

## JURISDICTION.

This action was brought under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325 and 5 U.S.C. § 1009 to set aside and enjoin an order of the Interstate Commerce Commission and also under provisions of 28 U.S.C. § 2201 and 5 U.S.C. § 1009 for a declaratory judgment to settle important questions relating to the power of the Commission (over the written protests of competing regulated carriers) to enter orders relieving railroads from the long-and-short-haul prohibition of Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4, without making the investigation which the statute requires and which the Commission specifically finds necessary and without making any factual findings whatever that the statutory prerequisites for such relief exist. The decree of the District Court was entered on September 16, 1960. The Barge Lines filed their notice of appeal on October 21, 1960. The time for filing this statement and the record below has been extended by order of the court below to January 20, 1961.

The jurisdiction of this Court is confirmed by 28 U.S.C. §§ 1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case. *I.C.C.* v. *A. L. Mechling Barge Lines Inc.*, 330 U.S. 567 (1947); *Dixie Carriers* v. *U. S.*, 351 U.S. 56 (1956).

## STATUTES INVOLVED.

The following statutes are involved:

The National Transportation Policy, 49 U.S.C., note preceding Section 1; Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4; Section 10 of the Administrative procedure Act, 5 U.S.C. § 1009; The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; and 28 U.S.C. § 2321. The foregoing statutes are set forth in Appendix G attached.

## QUESTIONS PRESENTED.

The questions presented by the appeal are as follows:

1. May the Commission over the due and timely protest of adversely affected parties in interest, including these appellants, lawfully authorize carriers by railroad which are subject to Part I of the Interstate Commerce Act forthwith to charge new rates proposed by said railroads which depart from the long haul-short haul requirement of Section 4 of said Act, by entering orders granting such authorization which make no findings of fact whatever, and particularly none disclosing any basis for authorizing said proposed departure rates or showing compliance in respect of such departures with the conditions, standards, requirements or provisions of said Act and Section 4 thereof, said orders providing that the Commission will, at some unstated future time, conduct a hearing to determine whether such departures fulfill the statutory conditions, standards, requirements and provisions under which the Commission is empowered to authorize them?

2. May the Commission over the due and timely protest of adversely affected parties in interest, including these appellants, lawfully enter such orders authorizing such rates to be charged, without making any findings that disclose the existence of a "special case" as described in Section 4 of the Interstate Commerce Act or compliance of such rates with any applicable statutory prerequisites?

3. May the Commission over the due and timely protest of parties in interest who are adversely affected, including these appellants, lawfully enter such said orders authorizing such said rates to be presently charged, without an investigation that enables it presently to approve

said departures from the long-and-short-haul requirement of Section 4 of the Interstate Commerce Act as lawful under the conditions, standards, requirements and provisions of the Interstate Commerce Act and especially Section 4 thereof and the National Transportation Policy?

4. Is judicial review by injunction and declaratory judgment of such an order of the Commission and of the Commission's continuing practice of entering such orders which have been sought in a proceeding duly brought by these appellants as injured protestants and pending, withdrawn from the judicial power of the United States by the railroads' subsequent filing of new rates and withdrawal of their fourth section application for the avowed purpose of avoiding such judicial review, when the Commission does not vacate the order in question, and these appellants have duly alleged that the Commission has repeatedly entered such unlawful orders to appellants' injury, and neither the Commission nor the railroads make any showing or give any assurance that the Commission will not continue to enter such orders in the future, and both cooperate to seek to avoid judicial review of such orders?

5. Can these appellants lawfully be deprived by the said devices of judicial review of the Commission's unvacated "temporary" order, which stands as a defense for the railroads to any proceeding by the appellants against the railroads for the injury caused by the railroads' said departure rates?

6. Has the United States consented to the use of a declaratory judgment in cases such as this, and does 28 U.S.C. § 2321 prohibit the use of a declaratory judgment in such circumstances?

## STATEMENT OF FACTS.

The proceeding before the Commission which is under review in this action was initiated by railroads serving the Northern Illinois grain producing area (hereinafter called the Western Railroads) and railroads operating east of Chicago (hereinafter called the Eastern Railroads). The Eastern Railroads and Western Railroads are collectively referred to hereinafter as the Intervening Railroads, or railroads.

On or about December 4, 1958, the railroads published and filed with the Interstate Commerce Commission, certain tariffs to become effective on January 10, 1959.

These tariffs admittedly provided rates which would be in violation of the long-and-short haul provision of Section 4 (49 U.S.C. § 4) of the Interstate Commerce Act, since they established lower rates on certain grain and grain products from Northern Illinois to the East, than were contemporaneously charged for the shorter hauls from intermediate points over the same routes to the East. Admittedly they could not therefore lawfully be made effective, unless the Commission granted relief from the prohibition of Section 4.

Accordingly, on or about December 4, 1958, the railroads, through their agent, H. R. Hinsch, filed with the Commission an application for authority to depart from the provisions of Section 4. That application was docketed by the Commission as Fourth Section Application No. 35140, Corn and Corn Products from Illinois to the East.

Waterways Freight Bureau, representing the appellants, who are barge line operators in competition with the Western Railroads for the traffic to which the normal rates would apply, and whose interests were admittedly

affected adversely by the said proposed rates, and various shippers, filed with the Commission timely protests against the proposed tariffs and against grant of the authorization requested in Fourth Section Application No. 35140. They further filed a petition for suspension of the tariffs. Similarly the appellant, A. L. Mechling Barge Lines Inc., filed such a timely protest and petition. These protests contained factual allegations that in substance the rail rates proposed by the railroads were lower than necessary to meet alleged water competition, threatened the extinction of legitimate water competition, and further were not "reasonably compensatory" as has been defined through long established administrative practice. All protestants offered to produce evidence substantiating their protests at a hearing on the Fourth Section Application.

On January 9, 1959, Division 2 of the Commission entered an order instituting an investigation into, and hearing on, the lawfulness of the rates, designating this proceeding as Docket No. 32790, Corn, Oats, Soybeans—Illinois to East, and *on the same day* entered Fourth Section Order No. 19059, (Appendix C) against which complaint is here made, authorizing the railroads forthwith to establish the proposed rates "until the effective date of the further order to be entered after hearing in fourth section application No. 35140, as amended." This order contained no finding of facts and took effect before the investigation, ordered concurrently therewith, was even commenced and before any hearings could be held. It states expressly that said rates were not approved by the Commission.

These rail rates took effect under authority of said orders on January 10, 1959, to the injury of appellants.

On or about January 28, 1959, Mechling, the Waterways Freight Bureau and a shipper filed petitions for reconsideration and vacation of Fourth Section Order No. 19059, but these were denied on March 10, 1959.

Thereafter, after many continuances and delays, hearings in Docket No. 32790 and Fourth Section Application No. 35140 were held before an Examiner of the Commission, commencing July 7, 1959, and ending July 16, 1959. On or about September 1, 1959, the railroads petitioned the Commission for further hearing in the proceedings and for their consolidation with other proceedings in respect to other related Fourth Section applications, requesting minute extensions of the area affected by the applications. Mechling, Waterways Freight Bureau and the shipper objected to any further hearing, but before the Commission could act on the railroads' petition, the railroads filed a supplementary petition seeking to introduce further evidence on the very matters covered by the hearings recently concluded. Again Mechling, Waterways Freight Bureau and the shipper protested these delaying tactics, but the Commission by Order dated October 29, 1959, reopened Nos. 32790 and F.S.A. No. 35140 for further hearing and consolidated them with other Fourth Section Application proceedings. No date was then set for the new hearing, and no hearings have been held since.

On November 16, 1959, these appellants together with Cargill, Incorporated, filed the complaint herein before a statutory three-judge court to enjoin, set aside, annul and suspend said Fourth Section Order No. 19059, and all orders supplemental thereto, attached hereto as appendices C, D, F and E (all of which hereinafter will be referred to collectively as F.S.O. 19059), and for a declaratory judgment to settle important questions relat-

ing to the power of the Commission over protests and without holding hearings or making findings of fact, to authorize carriers to charge rates conflicting with the long-and-short-haul prohibition of Section 4 of the Interstate Commerce Act.

The complaint alleged the facts heretofore set forth, and in addition alleged in Paragraph 19 that the Commission, despite decisions by three-judge district courts that orders, such as F.S.O. 19059, granting relief from the prohibition of Section 4 must be supported by findings, continues to follow the practice of entering such orders without supporting findings. This Paragraph of the complaint also alleged that earlier cases in which similar relief had been sought were treated as moot before they could be decided by the Supreme Court, and asked that in this case the court enter a declaratory order as well as an injunction.

The United States and the Interstate Commerce Commission filed their answer to appellants' complaint, and, although challenging certain conclusions stated therein, they did not deny any of the factual allegations thereof. The intervening railroads then were permitted to file their answer to appellants' complaint, which answer was substantially identical to the answer of the United States and the Interstate Commerce Commission and likewise did not deny the factual allegations of the complaint.

Thereafter, on March 28, 1960, the intervening railroads notified the Commission of the withdrawal of their Fourth Section Application. On March 31, 1960, the Commission permitted withdrawal of the application, without, however, vacating the order here involved.

The Commission and the railroads then moved to dismiss this proceeding, alleging that the withdrawal of the

Fourth Section Application had left no controversy before the Court below. The Court below sustained that motion on September 16, 1960.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

### Necessity For Obtaining Effective Judicial Review Of Commission's "Temporary" Fourth Section Orders.

Thus this appeal is brought to obtain an effective judicial determination of the lawfulness of said order propriety of a practice recently much used by the railroads (and abetted by the Commission) in wresting away traffic from competing modes of transportation (particularly from these plaintiffs) without submitting the Commission's action to effective judicial review.

This practice is initiated by the railroads which publish water-competitive (and truck-competitive) rates for the avowed purpose of obtaining for the railroads traffic then moving by water. Such rates are made low enough to insure substantial, and often even the entire, diversion to the railroads of the affected traffic, and are lower for the competitive rail hauls than they are for non-competitive shorter rail hauls in the same direction over the same route. In the absence of authorization by the Commission, the lower rates for the longer competitive hauls are prohibited by Section 4 of the Interstate Commerce Act. The railroads therefore file an application to the Commission for authorization to charge such rates while maintaining the higher intermediate rates. This application is commonly called a fourth section application since the railroads are applying for relief from the prohibitions of Section 4.

If competing carriers regard the rates as substanially injurious, they (and often the shippers using the competing carriers' services) file with the Commission timely

protests pointing out one or more ways in which the railroad rates in question do not comply with statutory conditions and standards set forth in the Interstate Commerce Act for the grant of exception from the prohibition of Section 4, including detailed information in support of their position, and offering to introduce further evidence at a hearing. Over these protests the Commission in recent years has repeatedly authorized the promulgation of the protested rates by the railroads until further order of the Commission (by an order which the Commission calls "temporary" despite the fact that it may be two or more years before the further order is issued) and at the same time has set the application for hearing at some unspecified future date. Such orders, just as the one involved in this proceeding, have contained no findings to show that the authorized rates are compensatory, not destructively competitive or otherwise in accord with the requirements of Section 4, the National Transportation Policy and other provisions of the Interstate Commerce Act.

When the competitive carriers have appealed the matter to a court, the railroads have in at least three instances[1] withdrawn their fourth section applications and moved to dismiss the appeal as moot, preventing judicial review. In one case[2] a three-judge court vacated the "temporary" order, but the Commission appealed the decision to this Court. Before this Court could render any decision, the Commission entered a further order superseding its "temporary" order under review. On its suggestion its appeal was then apparently without objection, dismissed as moot.[3]

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[1] Coastwise Lines v. U.S., 157 F. Supp. 305, 306 (1957); American Commercial Barge Line Company v. U.S., Civil No. 11772 (S.D. Tex., 1959) and this case.

[2] Dixie Carriers v. U.S., 143 F. Supp. 844 (1956).

[3] 355 U.S. 179 (1957).

In accordance with this Court's usual practice on appeals dismissed as moot, it instructed the three-judge court to vacate its order. The Commission has since that time refused to regard the three-judge court's opinion as a precedent, and has continued its practice of entering such temporary orders without findings to the continuing injury of these plaintiffs.

Thus, if these plaintiffs are not to have their traffic whittled away by a continuing series of orders by the Commission, none of which will ever be subject to any judicial review regarded as authoritative by the Commission, this Court must heed the plaintiffs' complaint of recurring injury by this continuing practice of the Commission.

This complaint of recurring injury was made in this case, whereas it was not made in the earlier cases referred to. By the time this case was filed the pattern of defeating judicial review by withdrawing the fourth section application (or entering a superseding order) had become established.

The rates complained of herein, the manner in which they are promulgated and used under so-called "temporary authority" until challenged in a court of law, and their subsequent withdrawal to frustrate judicial review, are part of what has become a consistent pattern of conduct which raises issues of great public importance in the area of public administration and regulation. The rates themselves vitally affect the keenly competitive relations between barge line operators (as well as other common carriers regulated under the Interstate Commerce Act) and railroads serving similar areas.

The present efforts of the railroads to capture traffic moving by other forms of transportation is a repetition

of similar practices which led to the enactment in 1887 of the Interstate Commerce Act. Rail carriers have from time to time engaged in ruinously destructive competition with water carriers where their services paralleled. The chief weapon of the rail carrier in this competition was, of course, drastically reduced rates on competing traffic, regardless of whether such rates were compensatory. Shippers over other parts of the rail carriers' lines were forced to subsidize this competition by higher rates. It was frequently the result of such juggled rates that shippers sending their freight in the same direction on long hauls through territory affected by such competition, could secure a lower total rate than short haul shippers over those portions of the same routes that were not affected by such competition. The result (successful from the rail carriers' point of view) of such destructive competition was the elimination of water carriers, and subsequent imposition of substantially higher rail rates overall. This history of the Interstate Commerce Act is detailed in the concurring report of Commissioner Eastman, then Chairman of the Commission at 194 I.C.C. 44 *et seq.*

This form of competition was a well understood phenomenon of the 1880's when Congress wrote into the Interstate Commerce Act the so-called long-and-short-haul clause (49 U.S.C. § 4). That clause was expressly designed to combat the more flagrant abuses of unfairly discriminatory rail rate-making which had so often worked to the extreme disadvantage of water transportation and short haul shipper alike. Section 4, as amended in 1910, reads in pertinent part substantially as follows:

> "§4. Long and short haul charges; competition with water routes.
>
> (1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to

charge or receive any greater compensation in the aggregate for the transportation of * * * like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance. *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: * * *"

**Invalidity of These Commission Fourth Section Orders Which Contain No Findings and Are Entered Before Hearings Are Held.**

It will be noted that this section directly prohibits, in the absence of prior Commission approval which may be given only in accordance with conditions and standards of the Act and of the National Transportation Policy, rates which provide for a greater compensation in the aggregate for the transportation of property "for a shorter than a longer distance over the same line or route in the same direction, the shorter being included within the longer."

When, as in this case, the railroads present for Commission approval lower rates for longer water competitive hauls (lower than for their shorter, non-water competitive hauls) otherwise prohibited by the Fourth Sec-

tion of the Act, the Commission is required, as a predicate for the authorization of such abnormal rates, to find the existence of a "special case" warranting departure from the long-and short-haul principle which the Act makes otherwise imperative and universal. *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914).

When further, as here the Commission in the order authorizing a departure rate expressly does not approve such rates and orders a hearing, it is obviously not in possession of the facts to find that a "special case" exists or that the rates are compensatory, and not destructively competitive as required by Section 4. Further, it does not find (because it does not have enough information to find) that the rates preserve the inherent advantages of competing forms of transportation. Yet such findings are required by the National Transportation Policy. *I.C.C.* v. *A. L. Mechling Barge Lines Inc.*, 330 U.S. 567, 574, 577, 579-580 (1947).

Nevertheless the Commission has adopted (with the cooperation of the railroads) a consistent practice of entering "temporary" orders allowing, over protest, Fourth Section departures which it expressly states it does not approve, without hearing *and without findings*. Orders affirmatively authorizing rates without findings are clearly unlawful. *Florida* v. *U.S.*, 282 U.S. 194, 212, 215 (1931); *U.S.* v. *Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 294 U.S. 499, 504-505 (1935). Yet under this practice the plaintiffs have had either to submit to loss of their business until the Commission entered a further order in the case some two or three years later, or to incur the expense of going into court each time to seek to set aside the "temporary" order immediately involved, but without hope of obtaining any protection against a repetition of like injury immediately thereafter.

**Courts Retain Jurisdiction Over Controversies in Which Recurring Injuries Are Alleged Even After the Injury Immediately Complained of Ceases.**

This Court, as well as other courts, has often held that such a pattern of recurring injurious acts is good reason for retaining jurisdiction of a proceeding brought to review one of them after the act has ceased through no connivance of the plaintiff. Two of the first of these decisions involved this Commission. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commision*, 219 U.S. 498 (1911); *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U.S. 433, 452 (1911); *U.S.* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *McGrain* v. *Daugherty*, 273 U.S. 135, 180-182 (1927); *Boise City Irrigation & Land Co.* v. *Clark*, 131 Fed. 415 (9th Cir., 1904); *Walling* v. *Haile Gold Mines*, 136 F.2d 102 (4th Cir., 1943); *Papaliolios* v. *Durning*, 175 F.2d 73 (2d Cir., 1949); *Gay Union Corporation* v. *Wallace*, 112 F.2d 192 (D.C. Cir., 1940), *cert. den.*, 310 U.S. 647; *Dyer* v. *Securities & Exchange Commission*, 266 F.2d 33, 46-47 (8th Cir., 1959), *cert. den.*, 361 U.S. 835 see also Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 136 (1946).

In most of the cases cited, the particular act originally complained of had lost all effectiveness to injure the plaintiffs. In the instant case, Fourth Section Order No. 19059 has not been vacated (only the railroads' fourth section applications were withdrawn) and the order complained of still stands as the railroads' sole authorization for having assessed rates, which without such authorizations are clearly unlawful. The order stands as a present defense to any proceeding by these plaintiffs against the intervening railroads for their damages caused by the railroads' assessment of rates which were unlawful without that authorization, since the lawfulness of Fourth

Section Order No. 19059 can not be attacked collaterally. *Venner* v. *Michigan Central Railroad Co.*, 271 U.S. 127, 130 (1926); *Callahan Road Company* v. *United States*, 345 U.S. 507, 512-513 (1953); *Simpson* v. *Southwestern Railroad Co.*, 231 F.2d 59, 62 (5th Cir., 1956), *cert. den.*, 352 U.S. 828.

The court below relied upon three decisions by this Court which involved no question of a recurring pattern of behavior by the defendants to the repeated injury of the plaintiffs. In *Mills* v. *Green*, 159 U.S. 651 (1895), the plaintiff complained that he was unconstitutionally to be prevented from voting for a delegate to a constitutional convention. The convention had convened before he perfected his appeal. There was no allegation that he had been or would be prevented from voting in other such elections.

In *Amalgamated Association of Street Etc. Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 416 (1951) this Court refused to review an award after the dispute concerning it had been settled by the parties, and the time limit in the award itself had expired. Despite this settlement by the parties, however, this Court retained jurisdiction of a companion case (its Docket No. 329) arising from the same labor dispute to determine the validity of a "perpetual" injunction against a strike by a public utility's employees issued by a state court during the course of the dispute, and in its opinion in the companion case held unconstitutional Wisconsin's law which was under attack in both cases. *Amalgamated Association of Street etc. Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383 (1951).

In *Local No. 8-6, Oil, etc. Union* v. *Missouri*, 361 U.S. 363 (1960) the limitation by statute of the right to strike in a labor dispute with a public utility was again involved.

The dispute had been settled before any appeal was perfected to this Court, but the plaintiff asked this Court to rule on the constitutionality of Missouri's statute solely because the case was the first one which had arisen under the statute, and it was anticipated that at some future date other cases might arise under the law. Clearly there was no recurring pattern or even imminent prospect of further injury to the unions who were the plaintiffs.

The Court below further relied on this Court's dismissal as moot of *Atchison, Topeka & Santa Fe Railway Co.* v. *Dixie Carriers,* 355 U.S. 179 (1957) and *United States* v. *Amarillo-Borger Express,* 352 U.S. 1028 (1957) even though those cases did not involve any allegation of a recurring pattern of injury. Thus the court below has not regarded those authorities which dealt with factual situations like the one here involved.

The Commission should not be permitted to continue its practice of entering on protested fourth section applications such "temporary" authority orders without hearing or findings in the absence of review of such practice by this Court. This practice is making substantial changes in the means of transportation used in the United States. Ultimately this practice must affect the very survival of those means of transportation which compete with the railroads. The railroads with their enormously larger capital investments are the only carriers which can effectively use this kind of hit-and-run rate-making as a competitive weapon against other forms of transportation. These questions should be considered by this Court only upon full briefs by the parties.

## CONCLUSION.

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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## APPENDIX A.

UNITED STATES DISTRICT COURT
Eastern District of Missouri
Eastern Division

Cargill, Incorporated, a corporation, et al.,
Plaintiffs,
vs.
United States of America and Interstate Commerce Commission,
Defendants,
The Pennsylvania Railroad Company, et al.,
Intervening Defendants.
No. 59 C 335 (3)

Before M. C. Matthes, Circuit Judge, Ray W. Harper, Chief Judge, and Randolph M. Weber, District Judge.

PER CURIAM.

Plaintiffs are barge line operators. They commenced this action on November 16, 1959, against the United States of America and the Interstate Commerce Commission seeking an injunction of the Commission's Fourth Section order No. 19059, entered January 9, 1959, and for a declaratory judgment. They are in competition with various railroads which can be classified into two groups: one, the eastern group which has trunk lines from Chicago, Illinois, to the east and with proportional or reshipping rates for long hauls and, two, the western group which has lines serving west of Chicago and with short haul rates that are higher than the eastern long haul rates. These railroads were granted leave to intervene.

District Courts have jurisdiction of actions to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission, §1336, Title 28, U.S.C., and the action has been brought in the judicial district of parties plaintiff as provided by §1398,

Title 28, U.S.C. A three-judge court was duly composed under the provisions of §§2284 and 2321-2325, Title 28, U.S.C. Motions to Dismiss were filed by defendants and intervenors challenging plaintiffs' Petition on the grounds of mootness and that declaratory judgment relief would not lie. These Motions were orally heard, supporting memoranda filed and the matter taken under submission.

The actions of the interstate Commerce Commission for which plaintiffs seek relief in this suit involve the matter wherein the intervenors published rates with the Commission in which combination (long haul) rates were lower than local (short haul) rates and relief was sought under Section Four of the Interstate Commerce Act.[1] The proceeding was entitled "Grain and Grain Products from Illinois to the East" and the plaintiffs here filed their protests.

The order of the Commission provided that the rates described in the application would become effective January 10, 1959, that they were subject to the Commission's investigation and approval, could not be increased unless authorized and the investigation would be made "with a view to making such findings and orders in the premises as the facts and circumstances shall

[1] §4, Title 49, U.S.C., provides that "it shall be unlawful for any common carrier * * * to charge or receive any greater compensation in the aggregate * * *, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, * * *: Provided, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized * * * to charge less for longer than for shorter distances * * *, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it * * *, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence; * * *." (Emphasis supplied.)

warrant." The matter was assigned for hearing at a time and place thereafter to be fixed and the intervenors here were permitted to become respondents to the proceedings.

Plaintiffs contend in this action that the establishment of rates, pending the hearing on the Section Four application and prior to actual investigation, hearing and finding of facts, amounts to an avoidance of the prohibitions contained in Section Four, which make it unlawful to charge or receive such rates. They say that such establishment of rates amounts to the granting of a "temporary rate" and is void and unlawful, arbitrary and capricious, thus depriving them of their property without due process of law and violative of the Fifth Amendment to the Constitution. On the declaratory judgment side, plaintiffs contend that this procedure is a continuous practice by the Interstate Commerce Commission; that the Commission thus establishes a rate without support by adequate findings from which it can be determined if the facts constitute a special case and if the rates are reasonably compensatory, all as required by Section Four; and that the Commission will probably enter a final order of dismissal to make the matter "moot" before this Court can hear and decide the issues and that such practice, too, has been followed in the past and is continuing to plaintiffs' damage.

The defendants and intervenors point out that the rail carriers did notify the Commission on March 28, 1960, of the withdrawal of their Section Four Application and requested cancellation of the Commission's temporary orders.[1] The Commission acted upon this notification on March 31, 1960, and the application was permitted to be withdrawn. They further state that the Commission records show that a new schedule of rates has been filed, reducing the local haul charges to where, in the aggregate, they will not exceed the long haul charges, and therefore, there is no further relief being sought, nor can it be given, under Section Four and the matter is "moot".

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[1] The court is mistaken. The railroads did not so request and the Commission did not cancel the orders. Footnote added by Appellants.

Plaintiffs, however, contend that this is a continuing practice of the Commission which results to their damage and say that this should remove the matter from the realm of mootness. They want this Court to not only enjoin and hold unlawful the Section Four order but to also declare the practice improper.

It is the duty of this Court to "decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U.S. 651, 653. This principle was recently restated by the Supreme Court in the case of *Local No. 8-6, Oil, Chemical & Atomic Wkrs.* v. *Missouri*, 361 U.S. 363. In this latter case an injunction had been granted against a union under authority of a Missouri statute; the Supreme Court of Missouri held the statute constitutional and certiorari was granted to the Supreme Court of the United States; in the meantime the injunction had expired and in deciding the matter the Court said at l.c. 367: "• • • we cannot escape the conclusion that there remains for this Court no 'actual matters in controversy essential to the decision of the particular case before it.' *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 116.

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *Amalgamated Assoc.* v. *Wisconsin Emp. Rel. Bd.*, 340 U.S. 416, 418. The very proposition here was involved in two recent decisions wherein the Supreme Court of the United States remanded three-judge court opinions with directions to dismiss for mootness. See *A.T. & S.F. R. Co.* v. *Dixie Carriers, Inc.*, 143 F.Supp. 844, 355 U.S. 179, and *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411, 352 U.S. 1028.

The same reasoning applies to the prayer for declaratory judgment relief. Section 2201, Title 28, U.S.C., creates a remedy "In a case of actual controversy within its jurisdiction, • • •."

There is nothing pending in the case before us. The chance of any controversy that existed has been terminated by dismissal. To lay down rules of practice for future guidance of the Commission would be nothing more than the substitution of judicial for executive administration. The Judiciary must confine itself within the constitutional and legislative grants of authority to review, determine or declare rights only where actual controversies exist. As said in *Local No. 8-6, Oil, Chemical & Atomic Wkrs.* v. *Missouri, supra,* at l.c. 396: "To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain."

For the reasons stated, defendants' and intervenors' Motions to Dismiss should be sustained and an Order will be entered to that effect.

## APPENDIX B.

UNITED STATES DISTRICT COURT
Eastern District of Missouri
Eastern Division

Cargill, Incorporated, a corporation, et al.,
Plaintiffs,
vs.
United States of America and Interstate Commerce Commission,
Defendants,
The Pennsylvania Railroad Company, et al.,
Intervening Defendants.
No. 59 C 335 (3)

ORDER

This cause was presented to the Court upon Motions to Dismiss filed by defendants and intervenors. Oral argument was heard, memoranda filed, and the matter taken under submission. The Court being fully advised in the premises, files its per curiam opinion and in accordance therewith it is

ORDERED that defendants' and intervenors' Motions to Dismiss be and the same are hereby sustained and plaintiffs' Complaint is dismissed and the relief therein prayed for denied.

Done this 16th day of September, 1960.

/s/ M. C. Matthes
Judge, United States Court of Appeals

/s/ Roy W. Harper
Judge, United States District Court

/s/ Randolph M. Weber
Judge, United States District Court

## APPENDIX C.

Fourth Section Order No. 19059

ORDER

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D.C., on the 9th day of January, A. D. 1959

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST

Upon consideration of the matters and things involved in fourth-section application No. 35140, as amended, filed by the Traffic Executive Association—Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 (Hinsch series) and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, which application, as amended, is hereby referred to and made a part hereof:

*It is ordered*, That, effective January 10, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35140, as amended, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their products, in carloads, as described in the application, from points in northern Illinois named in Appendix "C" of the application to points in central, trunk line, and New England territories, rates constructed on the basis described in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as

may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Division 2.

Harold D. McCoy,

Secretary.

(Seal)

## APPENDIX D.

Supplemental Fourth Section Order No. 19059

### ORDER

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D.C., on the 17th day of July, A. D. 1959.

### GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST

Upon consideration of the matters and things involved in fourth-section application No. 35507, filed by the Traffic Executive Association-Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 (Hinsch series) and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, which applications and order are hereby referred to and made a part hereof:

*It is ordered*, That fourth-section order No. 19059, entered as aforestated, be, and it is hereby, modified and amended by adding thereto the following paragraph:

*It is further ordered*, That, effective July 18, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35507, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, and soybeans, and their products, in carloads, as more fully described in the application, from points in northern Illinois to points in central, trunk-

line, and New England territories, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, division 2,

Harold D. McCoy,
Secretary.

(Seal)

## APPENDIX B.

Second Supplemental Fourth Section Order No. 19059

ORDER

At a Session of the Interstate Commerce Commission, Fourth Section Board, held at its office in Washington, D.C., on the 7th day of August, A. D. 1959.

GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST.

(From Wisconsin)

Upon consideration of the matters and things involved in fourth-section application No. 35559, filed by the Traffic Executive Association-Eastern Railroads, Agent, for and on behalf of carriers parties to its tariff I.C.C. 4403 and other tariffs named in the application, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, as modified and amended by supplemental order No. 19059, entered July 17, 1959, in application No. 35507, which applications, and order as amended are hereby referred to and made a part hereof:

*It is ordered,* That fourth-section order No. 19059, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

*It is further ordered,* That, effective August 18, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35559, applicants therein be, and they are hereby,

authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their products, in carloads, as more fully described in the application, to points in central, trunk line, and New England territories, from (A) points in Illinois and Wisconsin, when routed by way of Chicago, Ill., or points in the Chicago switching district, Kewaunee, and Milwaukee, Wis., or Milwaukee terminal stations, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided,* That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

Harold D. McCoy,
Secretary.

(Seal)

## APPENDIX F.

Third Supplemental Fourth Section Order No. 19059

### ORDER

At a Session of the Interstate Commerce Commission, Fourth Section Board, held at its office in Washington, D.C., on the 10th day of September, A. D. 1959.

### GRAIN AND GRAIN PRODUCTS FROM ILLINOIS TO THE EAST.

Upon consideration of the matters and things involved in fourth-section application No. 35623, filed by The New York Central Railroad Company for itself and on behalf of the carriers parties to its tariff I.C.C. 1169, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 19059, entered January 9, 1959, in fourth-section application No. 35140, as amended, as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

*It is ordered,* That fourth-section order No. 19059, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

> *It is further ordered,* That, effective September 15, 1959, and until the effective date of the further order to be entered after hearing in fourth-section application No. 35623, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed direct routes, for the transportation of corn, oats, soybeans, and their products, in car-

loads, as more fully described in the application, from points in Illinois on The New York Central Railroad Company to points in central, trunk line, and New England territories, all as named or described in the application, rates constructed on the basis described in the application, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

Harold D. McCoy,
Secretary.

(Seal)

## APPENDIX G.

The National Transportation Policy Act of September 18, 1940 c. 722 Title I §1, 54 Stat. 899, note preceding the Interstate Commerce Act, 49 U.S.C.:

> National transportation policy. Act Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12, 13 and 19 of this title, by inserting before Part 1 thereof (Chapter 1 of this title) the following provision entitled "National Transportation Policy": "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions:—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 4 of the Interstate Commerce Act. Feb. 4, 1887, c. 104, Pt. I, § 4, 24 Stat. 380; June 18, 1910, c. 309, § 8, 36 Stat. 547; Feb. 28, 1920, c. 91, § 406, 41 Stat. 480; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 6(a), 54 Stat. 904; July 11, 1957, Pub.L. 85-99, 71 Stat. 292, 49 U.S.C. 34:

§ 4. Long and short haul charges; competition with water routes

Charges for long and short hauls and on through route

(1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence:

*Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive Points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

Competition of railroads with water routes; change of rates

(2) Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Section 10 of the Administrative Procedure Act, June 11, 1946, c. 324, § 10, 60 Stat. 243, 5 U.S.C. § 1009:

§ 1009. Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proc edings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicabilitiy of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Interstate Commerce Commission Orders, Enforcement and Review Act of June 25, 1948, c. 646, § 1, 62 Stat. 969, amended May 24, 1949, c. 139, § 115, 63 Stat. 105, 28 U.S.C. § 2321:

§ 2321. Procedure generally; process

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

Declaratory Judgment Act, June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12 (p), 72 Stat. 349, 28 U.S.C. § 2201 and 2202:

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948 c. 646, 62 Stat. 964.